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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

NO.

ANDREW ANTHONY AHO

VS.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Andrew Anthony Aho, the petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on March 23, 1967.

CITATIONS TO OPINIONS BELOW

The opinion of the Judge of the United States District Court, Eastern District of Louisiana, printed in Appendix C was unreported. The opinion of the United States Court of Appeals for the Fifth Circuit, printed at Appendix B, is reported at _____ F 2d _____. The opinion of the same appellate court denying a rehearing, printed in Appendix A, is reported at _____ F 2d _____.

JURISDICTION

The order of the United States Court of Appeals, Fifth Circuit, denying the Petition for Rehearing was denied on April 27, 1967, printed in Appendix A hereto. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Petitioner is a seaman entitled to brin this suit pursuant to 28 USC 1916.

STATEMENT OF THE CASE

The essential facts are not in dispute: Between January 25, 1963 and July 11, 1963, the petitioner was employed by the Military Sea Transportation Service, and in that interim of time between February 12, 1963 to July 11, 1963, he was employed as a

member of the crew attached to the USNS PATCH and the USNS DUTTON, two vessels owned and/or operated by the same Military Sea Transportation Service. While attached to the said vessels the petitioner was caused to become ill and ailing with tuberculosis as a result of unseaworthy conditions aboard the said vessel and because of the negligence of the employees, agents and/or representatives of the sovereign. (R-1 to 4)

On March 4, 1965, a libel in Admiralty was brought against the United States of America to recover maintenance, wages and damages. (R-1 to 4). The United States of America moved for a summary judgment on the grounds that the petitioner's sole and exclusive remedy against the sovereign was under Federal Employees Compensation Act (5 USC 751, et seq.) (R-60 to 91)

On June 16, 1967, the United States District Court, Eastern District of Louisiana, Section B, rendered a judgment in behalf of the government granting the summary judgment. (Appendix C and D) The judgment of the district court was appealed to the United States Court of Appeals, Fifth Circuit, and on March 23, 1967, the appellate court affirmed the decision of the lower court. (Appendix B) A petition for a rehearing was filed on April 10, 1967, and on April 27, 1967, the same appellate court denied the rehearing. (Appendix A)

QUESTIONS PRESENTED

(1) Is the exclusion clause of the Federal Employees' Compensation Act to be afforded less validity than the exclusive remedy clause of the same act in the light of Reed v. Yaka (1963) 373 US 410, 83 S Ct 1349?

(2) Should not the Court's enlargement of the exclusive remedy clause and negation of the exclusion clause of the Federal Employees' Compensation Act as reviewed in Johansen v. United States (1952) 343 US 427, 72 S Ct 849 be re-reviewed?

(3) Is the government to be allowed to use employment contracts to shift its obligations and avoid its liabilities in like situations where private ship operators are denied such escape?

STATUTES INVOLVED

(1) Suits in Admiralty Act and The Public Vessels Act (46 USC 741, et seq.)

(2) Federal Employees Compensation Act.
[5 USC 8116 (c) of Public Law 89-554, approved Sept. 6, 1966, 5 USC 757 (b)]

(3) Longshoremen's and Harbor Workers Act (33 USC 905)

REASONS FOR GRANTING WRIT

The suits in Admiralty Act and the Public Vessels Act (46 USC 741, et seq.) imposes upon the government the same liability -- apart from seizure or arrest under libel in rem -- as is imposed by Admiralty Law on private shipowners. See Canadian Aviator Ltd. v. United States (1945) 324 US 215, 65 S CT 639. Accordingly, the petitioner avers there is nothing in the Suits in Admiralty and Public Vessel Acts which bars the petitioner, as a member of the crew, suing his governmental employer pursuant to these statutes wherein this same governmental employer consented to be sued.

The petitioner further avers there is nothing in the Federal Employees' Compensation Act /5 USC 8116 (c) of Public Law 89-554, approved September 6, 1966, formerly 5 USC 757 (b)/ to bar the petitioner seeking remedy pursuant to the said Suits in Admiralty and Public Vessels Act. And on the contrary, the exclusion clause (excluding members of the crew) of the Federal Employees' Compensation Act does bar the petitioner from coming within the scope of the said Federal Employees' Compensation Act. However, contrary to the provisions of the Federal Employees' Compensation Act (barring him as a member of the crew) the lower courts have held that the petitioner has an exclusive remedy thereunder this act.

And basically, the source of authority for this judicial position lies with Johansen v. United States (1952) 343 US 427, 72 S Ct 84

In that respect, the petitioner challenge the logical coherence and the logical consistency of these holdings, as follows:

(a) It is inconsistent for the courts to totally negate the exclusion clause at the same time it enlarges upon the Exclusive remedy clause of the said Federal Employees' Compensation Act;

(b) It is inconsistent to allow the government, as a ship-operator, to do what is prohibited of private ship-operators, namely: To use employment contracts to shift obligations and responsibilities;

(c) It is inconsistent for the courts to enlarge the scope of the exclusive remedy clause for the Federal Employees' Compensation Act at the same time the courts narrow the scope of the exclusive remedy in the Longshoremen's and Harbor Workers' Act (33 USC 905) so as it applies to private ship-operators;

(d) There is a poignant discrepancy between the holdings of Johansen v. United States, supra and Reed v. Yaka (1963) 373 US 410, 83 S Ct 1349, which needs clarification.

The Federal Employees' Compensation Act contains both an exclusive remedy clause and an exclusion clause. Read together these two clauses provide exclusive remedy for employees who are not members of the crew. If an employee of the sovereign is a member of the crew, then he is or should be excluded from the scope of the act. However, in Johansen v. United States, supra, a 5 to 4 decision, a member of the crew, notwithstanding the exclusion clause of the said act, was held to have exclusive remedy thereunder the Federal Employees' Compensation Act. Thus, in Johansen the exclusion clause of the said act was negated and/or ignored while the exclusive remedy clause was enlarged in scope so as to encompass a member of the crew, which would otherwise be or should be excluded.

In Ryan Stevedoring Co., Inc. v. Pan Atlantic Steamship Corporation (1956) 350 US 124, 76 S Ct 232 and in Reed v. Yaka (1963) 373 US 410, 83 S Ct 1349 the use of contracts to shift obligations were not allowed, especially as to the warranty of seaworthiness. In these cases it was stated that these obligations would not be limited,

evaded or escaped by merely choosing the proper type of employment contract. However, with reference to the instant petitioner, Andrew Anthony Aho, that is exactly what the government has been allowed to do: Merely by the assiduous use of an employment contract, the instant petitioner, a regular non-governmental employee, who for an occasion became attached to government operated vessels, meets the test of being a governmental employee as that test is defined by Johnansen v. United States, supra. Were the petitioner employed by Ryan Stevedoring Co., Pan Atlantic Steamship Corporation or Waterman Steamship Corporation, the existence of the contract would not alter his rights, but because the petitioner, happened to be employed by the government his rights and remedies are restricted.

In comparing the Federal Employees' Compensation Act with the Longshoremen's and Harbor Workers' Act, it is noted that while the exclusive remedy clause so as it applies to federal employees under the Federal Employees' Compensation Act has been enlarged in scope, so as to cover and include members of the crew, the corresponding exclusive remedy clause of the Longshoremen' and Harbor Workers' Act (33 USC 905) has been narrowed in its scope: See Ryan Stevedoring Co., Inc. v. Pan Atlantic Steamship Corporation supra;

Reed v. Yaka, supra, and Jackson v. Lykes Bros. Steamship Co., Inc. (1967) _____ US _____, _____ S CT _____. In all of the foregoing, Ryan, Yaka and Jackson, a literal interpretation of the exclusive remedy clause was narrowed in scope, rather than enlarged.

As suggested by Martin J. Norris in the Second Edition of "The Law of Maritime Personal Injuries" on Page 211:

> "The decision of Reed v. Yaka, supra, has weakened the impact of Johansen v. United States, supra, ... It is often by chance that the seaman employed for deep sea voyages on a government-owned vessel in one year receives employment on a privately-owned ship in a succeeding year. Mere chance then determines whether or not he is entitled to his traditional remedies."

Accordingly, the petitioner prays: Should not the Johansen's enlargement of the exclusive remedy clause and the negation of the exclusion clause be reviewed in the light of Reed v. Yaka, supra?

CONCLUSION

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

CHARLES R. MALONEY
Attorney for the petitioner
816 Richards Building
New Orleans, Louisiana 70112
Telephone: 522-9039

CERTIFICATE OF SERVICE

It is certified that the undersigned attorney is a member of the Bar of the United States Supreme Court.

It is certified that a copy of the foregoing petition has been mailed to the office of the Attorney General, Admiralty and Shipping Division, Washington, D. C. and also the office of the U. S. Attorney, 400 Royal Street, New Orleans, Louisiana 70130, on this date _____, 1967.

CHARLES R. MALONEY

APPENDIX (A)

UNITED STATES COURT OF APPEALS

Fifth Circuit

Office of the Clerk

Edward W. Wadsworth
Clerk

Room 408
400 Royal St.
New Orleans, La.

April 27, 1967

Re: No. 23866 - Andrew Anthony Aho
-vs- United States of America

Gentlemen:

You are hereby advised that the court has today entered an order denying the Petition for Rehearing in the above case. No opinion was rendered in connection therewith.

Very truly yours,

/s/ Edward W. Wadsworth,

EDWARD W. WADSWORTH,
Clerk

Mr. Charles B. Maloney
Attorney at Law
New Orleans, Louisiana

Messrs. Richard S. Salzman,
Morton Hollander and Jack H. Weiner

APPENDIX (B)

IN THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

NO. 23866

ANDREW ANTHONY AHO,
Appellant
versus
UNITED STATES OF AMERICA
Appellee

Appeal from the United States District Court for the Eastern District of Louisiana

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(March 23, 1967)

Before BROWN, MOORE, * and BELL, Circuit Judges.

PER CURIAM: Presented again is the question whether Yaka, [1] which rejected literal application of the exclusive liability section as

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*Of the Second Circuit, sitting by designation.

[1] Reed v. Yaka, 1963, 373 US 410, 83 S. Ct. 1349, 10 L. Ed. 2d 448, 1963 AMC 1373.

to private shipowners, 33 USCA § 905, permits the same result as to seamen on public vessels under a similar exclusive provision in the Federal Employees' Compensation Act, 5 USCA §757(b), in a suit under the Public Vessels Act, 46 USCA §§781-790.

In Suhar v. United States, 5 Cir., 1965 351 F. 2d 952, without saying so we necessarily rejected this contention which had been specifically urged. The result was the same in our earlier decision in Jarvis v. United States, 5 Cir., 1965, 342 F. 2d, 799, cert. denied, 1965, 382 U.S. 831, ... S. Ct. ....., 15 L. Ed. 2d 75. Since then two things of significance have occurred. The Supreme Court in Amell v. United States, 1966, ...U.S. ..... 86 S. Ct....., 16 L. Ed. 2d 445, 447, expressly recognized the continuing vitality of its earlier decisions[2] on which we specifically relied. More recently and more important it has in effect given specific approval to Jarvis. See United States v. Demko, 1966, ... U.S. ...., 87 S. Ct....., 17 L. Ed. 2d 258, 261, note 4.

AFFIRMED.

[2] Johansen v. United States. . . 343 U.S. 427, 72 S Ct. 849, 96 L. Ed. 1051; Patterson v. United States, ..., 359 U.S. 495, 79 S. Ct. 936, 3 L. Ed. 2d 971.

APPENDIX (C)

Minute Entry
March 8, 1967
Heebe, J.

ANDREW A. AHO
versus
UNITED STATES

ADMIRALTY
NO. 7158
SECTION B

This cause came on for hearing on a former day on motion of the United States for summary judgment. At that time the Court granted the motion. It now appears that this matter is set for hearing in the United States Court of Appeals for the Fifth Circuit. In order that the Court of Appeals may know the basis for this Court's decision, the following reasons are issued:

REASONS

Plaintiff here was a seaman employed by the United States on a public vessel. He alleged that he contracted tuberculosis and other serious illnesses due to the unsanitary and unseaworthy living and working conditions aboard the ship.

The United States has granted to its employees a remedy in workmen's compensation for disability resulting from personal injuries sustained in the performance of duty. 5 U.S.C.A. § 751. The United States moved for summary judgment on the ground that this compensation is the exclusive remedy for this employee.

The plaintiff argued that the Federal Compensation Act by its terms covers only injuries and not illnesses. That argument could not stand in that the Act specifically provides, 5 U.S.C.A. § 790 (g), that the term "injury" includes, in addition to injury by accident, any disease proximately caused by the employment.

Plaintiff then advanced an ingenious and clever theory for imposing upon the United States the same duty to provide seaworthy vessels as is imposed on other shipowners. In Johansen v. United States, 343 U.S. 427 (1952), which decision the Supreme Court expressly refused to reconsider and reaffirmed in Patterson v. United States, 359 U.S. 495 (1959), the Supreme Court held that civilian seamen employed on public vessels operated by the United States are limited to the remedy of the Federal Employees' Compensation Act notwithstanding that they are also seamen, and refused to give them the rights enjoyed by seamen not employed by the United States. Plaintiff, however, argued that those cases were decided prior to the decision in Reed v. The Yaka, 373 U.S. 410 (1963), and that the holding in Johansen should be reconsidered in the light of Yaka, constructing the following argument: in Yaka the shipowner (pro hac vice, as bareboat charterer) was also the stevedore; as shipowner he would be liable for damage caused by the unseaworthiness of his vessel; however, as stevedore and employer of the

injured longshoreman he would be insulated from all liability other than that provided by Longshoremen and Harbor Workers' Compensation. Notwithstanding this insulation from liability that would be enjoyed by him in the capacity of stevedore, Yaka held he could not be relieved from the duties imposed upon him in his capacity as shipowner. Plaintiff argues here that an analogous situation exists: just as in Yaka where the protection of a compensation act did not operate to eliminate the remedy that could be pursued against the same person in his capacity as shipowner, so here, even though the United States is insulated from liability by the compensation act, it likewise should not be protected from suits brought against it in its capacity as shipowner, and thus that the rationale of the Johansen and Patterson cases could be reviewed in the light of Yaka.

This ingenious argument could not stand for the simple reason that the United States, unlike other shipowners, can be sued only upon its own terms because of its sovereign immunity. The Federal Employees' Compensation Act is the exclusive remedy, not for the reason that that Act makes it the exclusive remedy, but for the reason that that is the only manner in which the United States has consented to be liable.

> "As the Government has created a comprehensive system to award payments for injuries, it should not be held to have made exceptions to that system without specific legislation to that effect." Johansen, supra, at 441.

For that reason, the doctrines enunciated in Yaka cannot be held applicable to the United.

Our conclusions above were fortified by the then-recent decision of the Supreme Court in Amell v. United States, 384 U.S. 158 (May 16, 1966), wherein not only were Johansen and Patterson given continued vitality by citation for the proposition that the compensation remedy is exclusive for federal employees who are seamen, but also the holding itself, involving the question of the proper jurisdiction to determine back pay claims of these federal seamen, chose as the remedial system the Tucker Act, which applies to all federal employees and sends them to the Court of claims, rather than the Suits in Admiralty Act, which applies to all maritime claims and thus to all seamen, and sends them to the District Courts. Thus, where the Court actually had a choice between two overlapping statutes, it chose to classify these people as federal employees rather than seamen. In the face of these Supreme Court decisions

and the sovereign immunity doctrine, the sole remedy available here is that of the federal employee, the Compensation Act, and not that of the seaman.

Thus, the motion for summary judgmer was granted.

/s/ FREDERICK J. R. HEEBE

APPENDIX (D)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

Andrew Anthony Aho	Division "B"
Versus	No. 7158
United States of America	Admiralty

JUDGMENT

The Court having, on June 6, 1966, granted the motion of respondent, United States of America, for summary judgment;

ACCORDINGLY, IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the respondent, United States of America, and against the libelant, Andrew Anthony Aho, dismissing said libelant's libel with costs.

Dated at New Orleans, Louisiana on this 16th day of June, 1966.

/s/ A. Dallam O'Brien, Jr.

A. DALLAM O'BRIEN, JR.
CLERK

Charles R. Maloney, Esq.
Anthony W. Gross, Esq.
Ernest N. Morial, Esq. JUN 16 1966

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 527

ANDREW ANTHONY AHO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The basic question here is whether, in view of the administrative compensation remedies available under the Federal Employees' Compensation Act,[1] both courts below correctly dismissed petitioner's libel against the United States for damages for sickness allegedly incurred incident to the performance of his duties as a federal civilian employee on a government vessel.

[1] Federal Employees' Compensation Act, 5 U.S.C. 8116(c) (1964 ed., Supp. II). This is the most recent codification of 5 U.S.C. 757(b), Act of September 6, 1966, Public Law 89-544, 80 Stat. 378. Compensation benefits payable under this Act may be as high as $1,450 per month. 5 U.S.C. Appendix 756(c) (1964 ed., Supp. II).

276-777—67

In *Johansen* v. *United States*, 343 U.S. 427, and *Patterson* v. *United States*, 359 U.S. 495, this Court squarely held that the Federal Employees' Compensation Act furnishes the exclusive mode of redress against the United States for sickness and injuries incurred by seamen employed by the United States aboard government vessels. And, as pointed out by the court below, this Court on two recent occasions has "expressly recognized the continuing vitality of its earlier decisions" in *Johansen* and *Patterson* (Pet. App. 13). *Amell* v. *United States*, 384 U.S. 158, 160-161; *United States* v. *Demko*, 385 U.S. 149, 151. Indeed, in *Demko* (385 U.S. at 151, n. 4), as further noted by the court below (Pet. App. 13), this Court "has in effect given specific approval to" *Jarvis* v. *United States*, 342 F. 2d 799 (C.A. 5), certiorari denied, 382 U.S. 831, a decision turning on the identical issue again raised by petitioner in the present case.

Petitioner seeks to avoid the impact of these settled and consistent holdings by contending (Pet. 9) that *Reed* v. *The Yaka*, 373 U.S. 410, calls for a different result here. But *The Yaka* case, of course, involved only the liability of private employers and presented no question of governmental immunity from suit by its employees, for whom Congress has provided a comprehensive administrative compensation system. Indeed, as pointed out by the district court below, "the United States, unlike other shipowners, can be sued only upon its own terms because of its sovereign immunity" (Pet. App. 16). Moreover, "the terms of its consent to be sued in any court define that court's

jurisdiction to entertain the suit." *United States* v. *Sherwood,* 312 U.S. 584, 586. Here the terms of the government's consent make the Federal Employees' Compensation Act remedy available "to the exclusion of both the Public Vessels Act, *Johansen* v. *United States,* 343 U.S. 427, and the Suits in Admiralty Act, *Patterson* v. *United States,* 359 U.S. 495." *Amell* v. *United States,* 384 U.S. at 160–161. *Amell* was of course decided subsequent to this Court's decision in *The Yaka* (see Pet. App. 15–17).

Thus, the decision below is plainly correct and is in full accord with this Court's earlier decisions directly in point. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

RALPH S. SPRITZER,
Acting Solicitor General.

SEPTEMBER 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967